Supreme Court of the United States

OCTOBER TERM, 1941.

ROSCO JONES, *Petitioner*, against CITY OF OPELIKA.	No. 280.
LOIS BOWDEN and ZADA SANDERS, *Petitioners*, against CITY OF FORT SMITH, ARKANSAS.	No. 314.
CHARLES JOBIN, *Appellant*, against THE STATE OF ARIZONA.	No. 966.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE ON APPLICATION FOR REHEARING.

The American Civil Liberties Union, which filed a brief as amicus curiae in two of the above cases, respectfully urges this Court to grant a rehearing in all three of them. The seriousness of the restriction on freedom of the press and of religion which will result if the decision of the Court stands, the fact that the division within the Court was so close, justify, we believe, a further consideration of the problem here presented.

It is evident that the decision of the majority has greatly curtailed the constitutional protection of freedom of speech, of the press and of religion. Indeed, these freedoms are given less protection from state interference than transactions in commerce have been given. For this Court has consistently struck down all attempts on the part of states or their subdivisions to license the solicitation of orders in interstate commerce. (See *Sabine Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 494; *Real Silk Hosiery Mills* v. *City of Portland*, 368 U. S. 325, 335.) The business interests affected in those cases were not put to the burden of proving that the amounts exacted were unreasonable.

Yet here, where much weightier matters than commerce are involved, the Court has imposed such a burden on petitioners, evidently upon the theory that the ordinances under review exacted fees as compensation for services rendered. However, the ordinances did not purport to be of this character or to be other than general taxing measures; nor were they construed by any of the State Supreme Courts to provide for reimbursement for expenses incurred by the city in policing the streets. This Court, in commerce cases, has laid down the definite rule that license taxes will be struck down where it did not "affirmatively" appear that the licenses were imposed, not as ordinary taxes, but as reimbursement for expenses incurred by the taxing authority. (*Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626, 628; *Ingels* v. *Morf*, 300 U. S. 290, 294; *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 181.) It is difficult to understand why this rule well established in commerce cases should have been disregarded in this more important field. So remarkable a change of position, we submit, requires further consideration.

An examination of the majority opinion, moreover, discloses certain misconceptions concerning the problem here presented which may, perhaps, explain the result. Thus

at pages 8 and 9 of the slip opinion there is reference to the right of the states to regulate the time, place and method of distribution of opinion. We respectfully submit that this discussion has no place in these cases. No attempt was made by any of the municipalities involved to regulate the manner of distribution. There is here no limitation of the hours during which distribution might be conducted, nor with regard to the portions of the city in which it might take place. No attempt was made by the State courts to justify these ordinances on the ground that they constituted regulations.

The next misconception which appears in the opinion of the majority is that the operations here taxed are "incidental" to the exercise of the freedoms protected by the Constitution (slip opinion, p. 9) and that petitioners used "ordinary commercial methods" to raise propaganda funds (p. 10). These statements would be true if petitioners had been selling articles of commerce for the purpose of securing funds for their religious or educational activities. We would not, however, then be here. But the material which was distributed in these cases, and for which a price or a contribution was asked, was not "incidental" to the religious or educational activities of Jehovah's witnesses. It was an integral part of their activities. For it was the essential nature of their activities that their views should be distributed as widely as possible. The pamphlets distributed consisted only of the views. They *were* the propaganda. They were not sold by ordinary salesmen, but by converts seeking to spread their views. Money was asked not to raise funds for the purpose of spreading propaganda elsewhere, but because the task of spreading the propaganda then and there required some financial assistance. Moreover, in view of the undisputed fact that the leaflets were offered free to all persons unable to pay, it is apparent that the essential objective of the distribution was to spread the ideas, not to raise money.

The essential position taken by petitioners is not that they are exempt from all taxation because engaged in religious activities, or in the distribution of ideas. They do not contend—and we certainly would not support them in any such contention—that the property employed by the organization or the individuals in such religious or other propaganda activities would be entitled to exemption from non-discriminatory taxation on constitutional grounds, although the property of the organization is universally exempted from taxation by legislative enactment. The difference, however, between ordinary ad valorem property taxes and general income taxes and a flat license tax is that the former fall but incidentally upon the exercise of the functions protected by the constitution, while the latter is a direct and immediate burden upon the exercise of such functions. It is of the same category as the gross income tax and the stamp tax and, like these, should be held unconstitutional when imposed on constitutionally protected functions.

We respectfully submit, therefore, that the view expressed (p. 10) that these transactions were commercial rather than religious or educational is without support in the evidence. We are not dealing here with any attempt to evade compliance with a regulation properly applicable to a commercial transaction by linking it up with a non-commercial activity, as was done in the *Chrestensen* case. Here each and every part of the transaction was non-commercial. The circumstance that money passed cannot alter the essential nature of the activities of these petitioners and appellant.

We suggest also that the statement of the Court (p. 10) that the Constitution does not distinguish between various kinds of taxes, while true, is both irrelevant and misleading. For this Court has not hesitated to strike down taxes on various grounds though the Constitution says nothing about them at all. Thus this Court has continuously refused to permit taxation unless there was jurisdiction to

tax—and the recent decision in *Tax Commission* v. *Aldrich* (86 Law. Ed. Adv. 911) certainly did not reject that doctrine. Moreover, this Court has, though with considerable variation in application, likewise struck down state taxes on federal instrumentalities and federal taxes on state instrumentalities, although there is no language in the Constitution which requires that result. And again the recent decisions restricting the application of this doctrine (such as *Graves* v. *New York*, 306 U. S. 466—Cf. *Standard Oil Co.* v. *Johnson*, 86 Law. Ed. Adv. 1063) have not rejected the fundamental principle. Moreover, at least in commerce cases, there still is a difference in treatment between gross income taxes and net income taxes (See *McGoldrick* v. *Berwind-White Coal Company*, 309 U. S. 33, 45, note 2).

The truth of the matter is that this Court has endeavored to pass on the validity of taxes by judging the effect of those taxes, even though the Constitution itself may have in it no language which directly touches the particular form of tax. So in the cases at bar it is not the particular form of the taxes which is important, but the effect of these taxes upon the privileges of freedom of speech, of the press and of religion guaranteed by the Constitution against interference by any state.

That the decision of the Court will have far-reaching and disastrous consequences can hardly be denied. While the amounts of the taxes were not challenged in the particular cases before the Court, in the belief that no such challenge was necessary in view of the nature of the ordinances, it can hardly be denied that the amounts are substantial and burdensome. If the opinion of this Court stands then all unpopular minority groups will be confronted with the necessity of challenging, in each instance, the reasonableness of the amount of the license fee exacted by each particular municipality. Until a number of these cases shall have reached this Court no one will know what standard will be applied. The litigation which will ensue will necessarily create a tremendous burden on all such groups. It

may indeed by itself result in a practical denial of freedom of distribution.

Moreover, while, in particular cases, the fee charged may ultimately be held to have been reasonable, it is fallacious to suppose, as does the majority opinion (p. 11), that the multiplication of such charges throughout the country will not impose an undue burden. It can hardly be supposed that in all communities the money received from the distribution will pay the amount of the tax imposed. Deficits will, therefore, arise which will multiply as the number of municipalities exacting such fees increases. The "enlarged field of distribution" will then be wholly illusory, resulting merely in a cumulative increase in financial burden. This is not a situation in any way analogous to the *Coverdale* case (303 U. S. 604) cited by the Court. The tax there was laid on the privilege of operating certain engines for the purpose of increasing pressure in a pipe line. It was held not to be a tax on interstate commerce because non-discriminatory. Nothing was said in that case about an enlarged field of distribution. Moreover there is an essential difference between the spread of commerce and the dissemination of ideas. The very safety of the country may depend on wide-spread information and education, often provided only by volunteers who must be financed as they go along.

Two other considerations indicate the basic unsoundness of the majority opinion. In the first place, it is evident that ordinances of this kind lend themselves to discrimination in enforcement (Cf. *Thornhill* v. *Alabama*, 310 U. S. 88). So long as they are confined to purely commercial matters there is little likelihood of such discrimination—or at least it can be taken care of in ordinary ways. However, when such licenses can be imposed on persons exercising political or religious functions, then it is practically certain that discrimination will result, that unpopular groups will be harassed for not having paid the tax and popular ones never required to pay it. The burden

will then be imposed upon the representatives of these unpopular groups to prove this discrimination, a burden difficult to sustain, and one which should never be imposed upon them in the first place.

Finally, the decision rendered opens wide the door to the harassing of unpopular groups by dubious testimony. If these groups now abandon their previous habit of requesting contributions in connection with the distribution of literature, it is safe to predict that their representatives will be arrested throughout the country on the charge that they did request a contribution. In the vital field of freedom of ideas, no such consequences should be possible. They could all be avoided by a realistic approach by this Court, by a recognition that the attempt to apply the ordinances to these cases was motivated, not by a desire to regulate the use of the streets, not by a desire to exact payments for services rendered, but in an attempt to interfere with an unpopular group in its desire to express its ideas. This Court should resolutely set its face against any such attempt, no matter what the form or the device may be.

Surely the views expressed in the opinions of the Chief Justice and of Mr. Justice Murphy are more consonant with the high standard which this Court has in recent years reached in the field of civil liberties than are the views of the majority. We respectfully urge that this Court reconsider this decision which, if not reconsidered, will some day be recognized as the most unfortunate recently rendered by the Court.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae

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